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28th ANNUAL PACIFIC COAST LABOR LAW CONFERENCE

"NEW PROCEDURES UNDER THE NATIONAL LABOR RELATIONS ACT: SOME CHALLENGES FOR THE LABOR BOARD"

Delivered by:

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Chairman
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& Trade Center
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It is a pleasure to return here to Seattle which, next to my home in northern California, is my favorite part of the United States. I have many good and fond memories of this city, dating back to the time that I came here and did research for both articles and my first book on the activities of the United Construction Workers, led by Tyree Scott of this city, in the late '60s and early '70s.[1] I recall that the first time that I came here in 1971 I said to a leading union lawyer, who was representing some of the construction union defendants in that case, "Is the Seattle Building Trades Decree working well?" "Yes," he responded. I then said, "Are blacks getting any jobs?" And he responded, "No."

But much of that was changed in the coming years due to the initiatives of many brave people like Scott and his colleagues, whom I had the pleasure of meeting during that period.

And, of course, I well remember my first and only other appearance before this Pacific Labor Law Conference in the spring of 1972 when I was a Visiting Professor of Law at Harvard Law School. The memories of some of those early days in Seattle are especially precious to me and I hope that it won't be another 23 years before I come back and revisit this very fine Pacific Labor Law Conference which you have established.

Since the arrival of the new appointees of the Board in Washington, D.C. fifteen months ago, we have made a number of changes in policy and have strengthened already existing procedures. On February 1, we issued a rule which both created settlement judges and permitted bench decisions by Administrative Law Judges. The settlement judge concept was created because of a concern that we need to do more to resolve unfair labor practice charges through peaceful alternatives to litigation and new settlement procedures rather than lengthy and sometimes acrimonious and wasteful litigation.

As you know, the Board has done a very good job over the years in the settlement process. Consistently, around 90 to 95 percent of the charges filed with the Board are either settled or withdrawn. Our major shortcoming lies in the settlement of cases once a complaint issues and a hearing is about to begin or has begun before the Administrative Law Judge. Here the settlement rate drops off substantially. Consistently less than 1 percent of all of the settlements are resolved at this stage subsequent to the time that a hearing begins.

Accordingly, on February 1, we devised a settlement judge procedure whereby a settlement judge may be appointed, with the consent of all sides, by the Chief Administrative Law Judge or one of his designated Associates. The proceedings before such a judge are confidential and cannot be released unless all parties agree. The theory here is that parties will be more likely to reveal their true positions and thus be more susceptible to modifications, compromises and to make concessions if they realize that such

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1 William B. Gould IV, *Black Workers in White Unions: Job Discrimination in the United States* (Cornell University Press) 1977.

positions and evidence cannot be used against them in a subsequent proceeding and that the settlement judge will not be the trier of fact.

The Chief Administrative Law Judge has been initiating the assignment of settlement judges in cases in which the trial is estimated to require ten days or longer, and is beginning to make such assignments in cases with estimates of at least five days. In several instances, one or more parties have rejected the offer of a settlement judge, but in a few cases, a party has requested such an assignment -- in two instances this happened even before the February 1 rule took effect. Thus far when a party has taken the initiative, the Board, through the Chief Administrative Law Judge, has never rejected the settlement judge approach.

In one case where the matter in dispute involved a rather complicated Section 8(e) matter, the parties wanted help from a judge with expertise and we assigned a settlement judge who had recently written two opinions in this area. He held a face-to-face conference with the parties, as a result of which that case was settled. Here the hearing was estimated to be a relatively short one but the issue was complex.

Generally, where the settlement judge holds face-to-face conferences -- and this is the desired procedure -- the Judges Division has tried to schedule the settlement conference on a day proximate to another trial which the settlement judge has been assigned to adjudicate. In this way, in this period of austerity, we can achieve cost savings. In the majority of cases where a settlement judge has been assigned, settlement conferences have resulted in settlements. We estimate that since February 1 the process has resulted in settlements in cases which would have taken a minimum of 17 weeks to try and has saved in addition all the time required for briefing and decision writing as well as a great deal of trial preparation. The amount of judge time spent in shepherding these settlements has been approximately three weeks.

One additional approach is being tried in our Philadelphia Region. Since April we have furnished an Administrative Law Judge to that Region 4 for two days a month to preside as a settlement judge over a docket of approximately ten cases each month. The region moves for appointment of a settlement judge in these cases and sets a calendar of face-to-face conferences on two consecutive days.

The first of these took place in early April. Before the settlement judge arrived, four of the cases settled. Three settled before the judge with his active participation, and, most significantly, the other three settled before hearing with active monitoring by telephone by the settlement judge.

The other aspect of the Administrative Law Judge changes on February 1 relates to so-called bench decisions. The ALJ now has the authority to ask for oral argument in lieu of briefs and to issue a bench decision within 72 hours of the close of the hearing, particularly in abbreviated single issue cases and ones in which the law is clear and the

matter is essentially factual. From February through the end of April, Administrative Law Judges have used these procedures on six occasions.

This is an important adjunct to our effort to expedite our cases so as to provide more speedy and effective relief -- and my hope and belief is that we will make greater use of this procedure in the coming months. In the average case when briefs are submitted, it takes between four and five months from the close of the hearing until the ALJ renders a decision. The theory of the February 1 rule is that under some circumstances, filing of briefs with the Administrative Law Judge may be unnecessary, and bench decisions can eliminate that delay.

As an arbitrator in numerous grievance as well as interest disputes over a period of almost thirty years, I found that many cases -- particularly those involving discharge and discipline -- were essentially factual and that I did not need the voluminous briefs so often sent to me by counsel advising me of whether another arbitrator in another relationship between the employer and the union had decided to resolve the propriety of discharges or discipline differently. It seems to me that the same holds true in connection with many of our cases -- again, particularly those involving discharge or discipline -- that arise under our unfair labor practice prohibitions.

Another reform in this area, not yet adopted by the Board -- but one which I hope to bring it back for the Board's consideration in the future -- is the use of recommendations by the ALJ which might be designed to produce both speed and the greater possibility of a settlement. This procedure has been used with a fair measure of success, it seems, in Japan which has its own NLRB and unfair labor practice procedures under a statute which bears some superficial similarity to ours.[2] Again, we must be imaginative in devising new techniques and methods both to expedite and settle -- and I believe that we are off to a good start in this regard.

At the Board itself, we have used "speed teams" for certain cases which are essentially factual, where credibility determinations already have been made by either an administrative law judge or a hearing officer in a dispute arising out of a representation proceeding. And from December 1994, when the speed team procedure was first adopted by the Board through April of this year, Board Members have processed 103 speed team cases. For the same period, the median number of days from assignment to subpanel for C (unfair labor practice) cases, was 46 days and for R (representation) cases, the median was 28 days. And, the median from subpanel to issuance of decision, in C cases was 31 days and in R cases 32 days. This means that such cases are, on average, being issued within two months of the time that we get them -- a considerable improvement of our median period of 99 days for unfair labor practice cases and 122 days for representation cases. Of course we can do better than this and I intend to continue to press for this objective.

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2 William B. Gould IV, *Japan's Reshaping of American Labor Law* (MIT Press) 1984.

The 1995 baseball case and, in particular, our decision of March 26 to seek injunctive relief against alleged owner unfair labor practice conduct involving unilateral changes in conditions of employment, dramatized the use of Section 10(j) through which we are obtaining relief which would be relatively meaningless if granted in the normal course of unfair labor practice proceedings. It is true that I very much wanted to see the 1995 season played -- but we adhered to the relevant principles of law in our March 26 decision. And, of course, the by-product -- which the Board could not have estimated on that fateful weekend -- has been the fastest start by the Boston Red Sox in recent memory.

But, it should be noted that if we had not moved for injunctive relief the Red Sox could have signed, under the new procedures which provided for right of first refusal for certain restricted free agents, former Montreal ace reliever John Wetteland because the Expos could not have matched the salary. But, because of our injunction, Wetteland remained the property of Montreal and they were able to deal him to the Sox's hated arch rivals, the New York Yankees, who had the minor league players in whom Montreal was interested.

But the real reason for the decision was the fact that relief, if granted in the '96 or '97 baseball season, could not be meaningful for the parties' bargaining needs and both compensation and performance in the '95 season. I am pleased that Judge Sotomayor issued her March 31 decision providing for temporary injunctive relief under Section 10(j) in the baseball case as a result of our March 26 decision.

We have authorized Section 10(j) injunctive relief in 146 cases since we arrived in Washington in March, 1994. In four instances we have rejected the General Counsel's request for authorization and in two of those four I have voted with the majority to reject the request.

But, given some of the attacks and criticisms that have been made of our use of this important weapon, it is significant to note that the use of Section 10(j) affects only a minuscule percentage of the cases before us. For instance, during the same period of time that we authorized 146 cases, the General Counsel issued 3,616 complaints. Thus the number of 10(j)s authorized was only 4 percent of the complaints issued by the General Counsel. During the same period we conducted 4,091 elections. Thus the number of 10(j)s authorized was only 3.6 percent of the elections conducted during that period. As significant and essential as Section 10(j) is -- our work here is particularly important in the regulation of conduct where there is no litigation or the normal administrative process litigation -- the fact of the matter is that most of our work does not concern such cases. Most of our cases involve the handling of representation and unfair labor practice cases through the normal administrative process.

Meanwhile, we have continued to enjoy the same high rate of success in this area. The success rate in the form of wins and settlements is 87 percent. As of May 22, 1995, the Board had lost only seven cases under Section 10(j) in federal district court.

Finally, I want to return to a theme on which I spoke in New York City last week. This is the problem of employee communication through employee committees with or without union representation.

As you know, the law places some limits on such committees, particularly under the anti-company union prohibitions of the statute contained in Section 8(a)(2). As I noted last week, there are a number of issues which have been posed to us and which will be resolved in future cases.

Meanwhile, legislation is pending before Congress which will allow for such committees without the constraints of Section 8(a)(2). This is the TEAM Act and, for the reasons I stated in New York, particularly the lack of any protection for employee free choice in connection with such committees, I do not think that the TEAM Act is the appropriate vehicle through which to address this issue.

My own judgment is that a variety of methods for employee representation and communication are appropriate. Some of them will involve employee committees, some unions -- and some of these relationships may involve new unions -- just as new unions burst forth in the period of the 1880s in Great Britain and the Great Depression in our country in the 1930s.

I am of the view that representation can be achieved through other forms of representation as well. As I wrote 2 years ago,[3] where there is no union representation, and a substantial number of employees desire it, it may be appropriate to mandate -- today the law permits it -- minority union representation on a members' only basis on a limited number of issues such as dismissals, discipline, health, safety and the like.

We ought to be about the business of promoting a variety of democratic modes of representation. While I do not favor the creation of statutory works councils which are mandated as in Europe -- principally because of the tension between this procedure and existing schemes of union representation in this country -- I think that it is appropriate to allow employers and employees to voluntarily devise new procedures for representation. I do not think that secret ballots should be required in all instances for employee committees -- anymore than they should be mandated, under an amended statute and within the context of existing unfair labor practice law where a union is certified as exclusive bargaining representative.

Again, the abiding theme through all of this is to promote representation, involvement and participation. As the summer months move along and debate emerges on the TEAM Act, I hope that serious consideration will be given to some of these ideas. And I look forward to discussing with you, now and in the future these issues.

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3 William B. Gould IV, *Agenda for Reform: the Future of Employment Relationships and the Law* (MIT Press) 1993.

It is a pleasure to back here in Seattle with you. This is an exciting time to be at the Board and to be with dedicated regional offices throughout the country, in which Seattle stands second to none.

Again, it is good to be back here and I look forward to future contact with you during the coming months and years.

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